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CHRONOLOGICAL LIST OF PERTINENT DOCKET DATES

U.S. District Court for the District of Montana:

September 22, 1971	Motion for 12 Man Jury and Order Denying Request for 12 Man Jury
October 5, 1971	Order Vacating Trial Date Subject to Court of Appeals Ruling

U.S. Circuit Court of Appeals for the Ninth Circuit:

October 4, 1971	Petition for Writ of Mandamus
October 13, 1971	Order Staying Jury Trial in District Court
November 10, 1971	Answer and Return of Respondent, U.S. District Judge Battin
December 14, 1971	Answer of Respondent State Farm Mutual Automobile Insurance Company
March 6, 1972	Opinion and Order Denying Writ of Mandamus

U.S. Supreme Court:

May 4, 1972	Petition for Writ of Certiorari
October 10, 1972	Order Granting Certiorari

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

ROLAND V. COLGROVE,

Plaintiff,

Civil No. 783

-vs-

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and WAYNE CALKINS,

Defendants.

* * *

TRANSCRIPT OF MOTION AND RULING OF COURT

PROCEEDINGS

September 22, 1971

1:30 P.M.

...

MR. COLGROVE: I ask you, Your Honor, that you waive the local rule and go on a twelve-man jury, in place of the six-man jury.

THE COURT: The motion and request of counsel for the Plaintiff to waive the local rule requiring a six-man jury in a civil case and abide by rule 48 of the Federal Rules of Civil Procedure is denied. The Court intends to impanel a six-man jury to try the case.

In order to accommodate you, I will set this over to October 12th. I will vacate the trial setting heretofore made of September 27th, at 9:30 A. M., and reset it for October 12th at 9:30 A.M.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 71-2546

ROLAND V. COLGROVE,

Petitioner,

-vs-

HON. JAMES F. BATTIN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MONTANA, BILLINGS DIVISION,

Respondent.

PETITION FOR WRIT OF MANDAMUS

Comes now Roland V. Colgrove, petitioner and plaintiff above-named, and petitions this court or any judge thereof to issue a writ of mandamus directing the Hon. James F. Battin, Judge of the United States District Court for the District of Montana, Billings Division, to try Civil No. 783 to a trial jury of twelve persons, rather than to a jury of six persons as heretofore ordered by the District Court, pursuant to Rule 13(d)1 of the Revised Rules of Procedure of the United States District Court for the District of Montana.

I.

THE FACTS SUPPORTING THE PETITION ARE AS FOLLOWS:

(1) Rule 13(d)1 of the Revised Rules of Procedure of the United States District Court for the District of Montana became effective on September 1, 1971, and provides:

> "A jury for the trial of civil cases shall consist of 6 persons * * *."

(2) The District Court fixed September 27, 1971 for the commencement of the trial of Civil No. 783 to a trial jury consisting of six persons.

(3) On September 22, 1971, plaintiff moved the court to try Civil No. 783 to a trial jury of twelve persons.

rescheduled the trial of the case to commence on October 12, 1971, to a trial jury of six persons.

II.

THE ISSUES HEREIN PRESENTED ARE AS FOLLOWS:

(1) Williams v. Florida, 26 L.Ed. 2d 446, interpreted only the Sixth Amendment as it related to the number of trial jurors in criminal actions and expressly left undecided whether Congress and the States were prohibited by the Seventh Amendment from reducing trial jurors in civil actions to any number less than twelve.

(2) District Court Rule 13(d)1 is inconsistent with Rule 48 and violates Rule 83.

(3) Congress, having declared that a civil trial jury less than twelve may be had only on stipulation of the parties, conferred upon the parties rights which the District Court may not alter, amend, or repeal by local rule.

III.

THE WRIT SHOULD BE ISSUED FOR THE FOLLOWING REASONS:

(1) A trial on the merits of Civil No. 783, without first determining the validity of local Rule 13(d)1 would needlessly consume judicial time, effort and expense in the trial court and in the appellate court, in the event of an appeal. An appeal by the successful party is almost certain because:

(a) Local Rule 13(d)1 may be unconstitutional as violating the Seventh Amendment relating to civil actions wherein the words "common law" twice appear. The words "common law" are absent from the Sixth Amendment. At common law a trial jury consists of twelve jurors. Williams v. Florida, 26 L.Ed. 2d 446, held that a Florida statute limiting trial jurors to six in criminal cases did not violate the Sixth Amendment, but in Note

30 said in part:

> "While much of our discussion in this case may be thought to bear equally on the interpretation of the Seventh Amendment's jury trial provisions, we emphasize that the question is not before us; we do not decide whether, for example, additional references to the 'common law' that occur in the Seventh Amendment might support a different interpretation."

(b) Local Rule 13(d)1 limiting trial jurors to six in civil actions is inconsistent with Rule 48. Under Rule 83, District Courts may make local rules regulating their practice "not inconsistent with these rules." Rule 48 allows the parties to stipulate to a trial jury "of any number less than 12." The language is clear that a panel of twelve jurors is contemplated, making Rule 13 (d)1 inconsistent with Rule 48.

(c) Local Rule 13(d)1 also contravenes Rule 48 by foreclosing a stipulation by the parties of a trial jury consisting of "any number less than twelve", to-wit: Eleven, ten, nine, eight or seven.

WHEREFORE, petitioner prays:

(1) That an order be issued, directed to the Hon. James F. Battin, Judge of the United States District Court for the District of Montana, Billings Division, directing him to vacate his order that Civil No. 783 be tried to a trial jury of six persons and requiring him to try the case to a trial jury of twelve persons.

(2) In the alternative, that an order be issued, directed to the Hon. James F. Battin, Judge of the United States District Court for the District of Montana, Billings Division, requiring him to show cause in this court, at a time to be designated, why he should not vacate his order that Civil No. 783 be tried to a trial jury of 6 persons and why he should not be required to try Civil No. 783 to a trial jury of twelve persons.

(3) That such stay of the trial proceedings fixed by the Honorable District Judge to commence on October 12, 1971,

as may be necessary to enable this court to hear and determine this petition be granted.

(4) That plaintiff have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,
Lloyd J. Skedd
Office and Post Office Address:
P. O. Box 201
Helena, Montana 59601; and
Roland V. Colgrove
Office and Post Office Address:
14 North 9th Street
P. O. Box 550
Miles City, Montana 59301
Attorneys for Plaintiff
By: Roland V. Colgrove

(Certificate of Service omitted)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

(Title omitted in printing)

ANSWER AND RETURN

I.

Respondent accepts petitioner's statement of facts.

II.

ISSUES

A. Whether Rules 83 and 48, Federal Rules of Civil Procedure, 28 United States Codes, require that Rule 13(d)(1), Revised Rules of Procedure of the United States District Court for the District of Montana, be voided by this court.

B. Whether Rule 13(d)(1), Revised Rules of Procedure of the United States District Court for the District of Montana, violates the Seventh Amendment to the United States Constitution and is therefore unconstitutional.

III.

REASONS WHY THE WRIT SHOULD NOT ISSUE

A. Rule 83, F.R.Civ.P., 28 U.S.C., provides that District Courts may "make and amend rules" governing practice in the respective districts, if those rules are "not inconsistent with these rules." Therefore, for this court to hold that Montana District Court Rule 13(d)(1) cannot stand, it must find that rule inconsistent with one of the Federal Rules of Civil Procedure.

Petitioner alleges that the local rule in question is inconsistent with Rule 48, F.R.Civ.P., 28 U.S.C. That rule is stated as follows:

> "Rule 48. Juries of Less than Twelve--Majority Verdict.
>
> "The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

Respondent contends that the Montana District Court Rule 13(d)(1) is not inconsistent with Rule 48, F.R.Civ.P., 28 U.S.C. Rule 13(d)(1) reads as follows:

> "Rule 13
>
> "(d) Jury Trials.
>
> "1. A jury for the trial of civil cases shall consist of six persons plus such alternate jurors as may be impaneled."

In Rule 48, Federal Rules of Civil Procedure, Congress did not require that juries be made up of twelve members. Rather, Congress merely provided <u>one</u> way in which a jury of less than twelve members might be properly formed. Congress did not, however, specify in Rule 48 that the only way a jury of less than twelve persons could be formed was by stipulation.

To hold that Rule 48 requires a jury of twelve members is

to put words in the mouth of Congress and attribute something to that rule which is not required and which was not intended. In view of the decision of the United States Supreme Court in Williams v. Florida, 399 U.S. 78 (1970), wherein a Florida rule providing that a six-member jury decide criminal cases was upheld, Respondent's interpretation of Rule 48 has even more support.

The Respondent recognizes that the Supreme Court in Williams indicated that a legislature could find a good reason why a twelve-member jury was preferable. However, the Court stated that its holding

> "... does no more than leave these considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury." Williams, 399 U.S. at 103.

Because the decision in Williams as to the number of jurors in criminal cases, and by implication in civil cases, in Federal District Court is left to Congress, its intent must rule. Respondent urges this court to rule, based upon the language which Congress chose to use in Rule 48, that it was not the intent of Congress to require in that rule that juries must consist of twelve, and only twelve, persons, unless the parties stipulate to a lesser number. Certainly, had Congress intended this to be the rule, it could have specifically so stated. Instead, Congress elected to use language which can reasonably be construed to show an intent to allow juries of less than twelve persons by means other than stipulation of the parties.

Such an interpretation is further supported by the fact that Congress in writing the criminal counterpart to Rule 48, Rule 23(b), Federal Rules of Criminal Procedure, 18 U.S.C., specifically stated that juries were to be made up of twelve persons.

The Montana District Court is not alone in adopting a six-

man jury rule. As of October 1, 1971, thirty-one districts had put into effect similar rules. As early as January 1, 1971, the District of Minnesota adopted a six-man jury rule for specific types of cases. Chief Judge Edward A. Devitt, District of Minnesota, in an article entitled "The Six-Man Jury in the Federal Court" (hereto attached and marked Exhibit "A"), discussed the propriety of the six-man jury rule. Discussing the Williams case, Judge Devitt stated,

> "It is logical to conclude that if called upon to do so the Supreme Court would take a similar view of the jury trial provision of the Seventh Amendment. It appears highly unlikely that the Court would give a stricter interpretation dealing with civil cases than it now has to the Sixth Amendment provision dealing with criminal trials." Devitt, Page 2, Exhibit "A".

B. Respondent contends that the Constitution of the United States does not require that juries in civil trials consist necessarily of twelve members. The Seventh Amendment to the United States Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

While the Supreme Court in Williams, supra, dealt with the meaning of the jury trial provisions of the Sixth Amendment as it pertains to criminal trials, the Court stated in a footnote:

> "While much of our discussion in this case may be thought to bear equally upon the interpretation of the Seventh Amendment's jury trial provisions, we emphasize that the question is not before us; we do not decide whether, for example, additional

> references to the 'common law' that occur in the Seventh Amendment might support a different interpretation." Williams, 399 U.S. at 92, n. 30.

Respondent submits that these references in the Seventh Amendment to the common law do not mandate a finding that a twelve-member jury is required in civil trials.

The first reference to the common law merely defines the type of case in which the right of jury trial exists. The term "common law" is used to distinguish a "case at law", which traditionally included the right to jury trial, from cases in equity, which traditionally did not include that right. Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co., 72 F. 957, 960 (C.C. E.D. Tenn. 1896).

The second reference to the common law in the Seventh Amendment merely assures that decisions of fact made by a jury shall not be reexamined in any court of the United States except according to the established rules of the common law. Baltimore and Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).

Clearly, these references to the common law do not pertain to the make-up or nature of the jury itself. Consequently, it is Respondent's contention that the Supreme Court's interpretation of the meaning of the right to trial by jury as it pertains to the Sixth Amendment is completely applicable to the meaning of the right to trial by jury as it pertains to the Seventh Amendment.

The Supreme Court, in Williams, summing up the significance of the number twelve as it applied to the size of a jury, stated:

> "In short, while sometime in the 14th century the size of the jury at common law came to be fixed generally at twelve, that particular feature of the jury system appears to have been a historical accident, unrelated to the great purposes which gave rise to the jury in the first place." Williams, 399 U.S. at 88-90.

In discussing earlier cases which had upheld the theory that

constitutionally a jury must be composed of twelve members, the Supreme Court also noted that none of these cases had discussed an essential step in the support of such a position:

> "... namely, that every feature of the jury as it existed at common law--whether incidental or essential to that institution--was necessarily included in the Constitution wherever that document referred to a 'jury.'" Williams, 399 U.S. at 91.

In a footnote, the Supreme Court found a similar situation existing as to interpretation of civil jury trial requirements:

> "Similarly, cases interpreting the jury trial provisions of the Seventh Amendment generally leap from the fact that the jury possessed a certain feature at common law to the conclusion that that feature must have been preserved by the amendment's simple reference to trial by 'jury.' ... citing cases." Williams, 399 U.S. at 92, n. 30.

Finally, the court recognized that it could not "devine precisely what the word 'jury' imported to the Framers, the First Congress, or the States in 1789." Williams, 399 U.S. at 98. The Court added, however, that there was

> "... absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury. Nothing in this history suggests, then, that we do violence to the letter of the Constitution by turning to other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution. The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial. Measured by this standard, the twelve-man requirement cannot be regarded as an indispensable component of the Sixth Amendment."

Williams, 399 U.S. at 99-100.

Respondent urges the court to accept this language as relevant, not only to an interpretation of the Sixth Amendment but also to an interpretation of the Seventh Amendment, and apply the logic of the Supreme Court in Williams to the case at bar.

Respondent recognizes that pre-Williams courts have ruled that a jury in a civil trial must consist of twelve members. E.g., Capital Traction Company v. Hof, 174 U.S. 1 (1899); American Publishing Company v. Fisher, 166 U.S. 464 (1897); Diederich v. American News Co., 128 F.2d 144, 145 (10th Cir. 1942). However, in Baltimore and Carolina Line, Inc., supra, the United States Supreme Court discussed the purpose of the Seventh Amendment and created language which, when considered in view of the Williams decision, supports the contention of Respondent.

There the Court stated:

> "The aim of the [Seventh] Amendment, as this court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court." Baltimore, 295 U.S. at 657.

It is the contention of Respondent that the substance of the common law right of trial by jury does not include the requirement that a jury consist of twelve members. Rather, Respondent contends that the interpretation of the right of jury trial guaranteed by the Sixth Amendment applies equally to the right of jury trial guaranteed by the Seventh Amendment, and that therefore a twelve-member jury is not required by the

Constitution. The Constitution merely requires that a jury, of some unstated number, must pass on issues of fact in cases at law.

Many policy arguments exist to support the contentions of Respondent. The extremely crowded conditions of District Court calendars is a well-known fact. A six-man jury system would decrease the time needed for trial. Furthermore, a six-man jury system would substantially reduce the cost to the taxpayer of jury trials. Respondent recognizes that monetary considerations are secondary to considerations of justice. However, where, as here, both justice and financial savings may be achieved, the latter is an appropriate factor for consideration in this matter.

In his article, Judge Devitt discussed financial savings achieved under a six-man jury rule in Minnesota:

> "In the five month period since the rule became effective, the Judges of the Court have tried every case covered by the rule to six-man juries without incident or objection. The twenty-seven civil cases so tried took eighty-nine trial days totaling 524 juror days. The immediately discernable financial savings is substantial. Jurors received statutory compensation of $20.00 per day and an estimated average of $5.00 per day in mileage and expense reimbursement for a total of $25.00 per day. This figure multiplied by the 524 juror days which were saved by the six-man jury rule represents a money saving of $13,100." Devitt, Pages 5-6, Exhibit "A".

In reference to the time saved, Judge Devitt noted that during the same period in which the twenty-seven civil cases were tried, the judges tried sixteen criminal cases and two civil anti-trust cases, not covered by the rule, to twelve-man juries.

Respondent submits, also, that six-member juries present a more workable group for weighing factual determinations. With

the smaller group, it is more likely that a valid, comprehending study of the facts presented will be made by all members of the jury. Better considered judgments are more apt to result. However, the possibility that one man can prevent a verdict from being unanimous, thereby creating a mistrial, still exists with equal force. Consequently, certain advantages appear in the use of a six-man jury, while the normal factors akin to the jury system remain undiminished.

Respondent therefore urges that the court deny the petition for a writ of mandamus, and instead uphold Rule 13(d)(1), Revised Rules of Procedure of the United States District Court for the District of Montana.

Respectfully submitted,
James F. Battin
United States District Judge
For the District of Montana
Billings Division

(Certificate of Service omitted)

EXHIBIT "A"

THE SIX MAN JURY IN THE FEDERAL COURT

BY

EDWARD J. DEVITT, CHIEF JUDGE
U. S. DISTRICT COURT, DISTRICT OF MINNESOTA

The successful use of six-man juries in civil cases in the Federal District Court of Minnesota has resulted in improved efficiency at less cost without sacrifice of legal rights and argues for nationwide employment of juries of less than twelve in civil cases in the federal courts.

The Minnesota experience, although based on a limited period of five months of actual operation, has evoked expressions of complete satisfaction with the innovation from judges, lawyers and litigants, has materially shortened trial time, increased judicial

efficiency and resulted in substantial financial saving to the government in jurors' fees and expenses. The fact that, to date, the plan has been emulated by the adoption of similar six-man jury rules in at least 15 other federal districts and is under study in 19 or more additional districts and that the Judicial Conference of the United States has endorsed in principle the use of smaller juries in civil cases supports the hopeful prognostication that within a short time civil jury issues in the Federal Court System customarily will be tried to juries of less than the traditional twelve.

This marked progress toward improving the efficiency of our court proceedings was made constitutionally permissible by the decision of the United States Supreme Court in its landmark decision, Williams v. Florida, 90 S.Ct. 1893, decided June 22, 1970.

-1-

The Williams decision is historic in that it reversed a long-held view that the "trial by jury" requirement of the Sixth Amendment to the United States Constitution necessitated a twelve-member body. The Court evaluated historical documentation for the assumed sanctity associated with the number twelve (such as Lord Coke's explanation that the "number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc.") and concluded that the reasons given in support of the number twelve rest "on little more than mystical or superstitious insights . . ." Williams, p. 1899.

The Court said:

> ". . . the fact the jury at common law was composed of precisely 12 is an historical accident, unnecessary to effect the purpose of the jury system . . . and wholly without significance 'except to mystics.'" Williams, p. 1907.

In overruling the earlier leading decision of Thompson v. Utah, 170 U.S. 343, 18 S.Ct. 620 (1898), the Supreme Court

concluded:

> "We hold that the 12-man panel is not a necessary ingredient of 'trial by jury'." Williams, p. 1899.

Williams was a criminal case involving a Florida statute which provided for six-man juries, and construed that statute against the jury provision of the Sixth Amendment. It is logical to conclude that if called upon to do so the Supreme Court would take a similar view of the jury trial provision of the Seventh Amendment. It appears highly unlikely that the Court would give a stricter interpretation to the Seventh Amendment provision dealing with civil cases than it now has to the Sixth Amendment provision dealing with criminal trials.

-2-

There is no federal statute or rule requiring juries of twelve in civil cases.[1] Twelve member juries are specifically required in criminal cases by Rule 23 of the Federal Rules of Criminal Procedure.

Absent a controlling statute or rule of general application and in the light of the holding in Williams, the Judges of the United States District Court for the District of Minnesota adopted a Local Rule providing for six-man juries in most civil cases.[2] In the interest of securing the cooperation of the members of the Bar in accepting the Rule graciously and assisting in making its purposes effective, the Rule was made applicable only to those cases where jurisdiction was also obtainable in the state courts. Hence it was limited to Diversity, FELA and Jones Act cases with the

---

1. Rule 48 of the Federal Rules of Civil Procedure authorizes the parties to stipulate to a jury of less than 12. This rule was adopted before the Williams decision and was drafted in the light of the then long established constitutional interpretation, see Thompson v. Utah, supra, that a jury must consist of 12 members. But an inference that Rule 48 now requires a jury of 12

absent a stipulation is, in my view, not a proper post-Williams interpretation of the Rule.

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2. The Rule reads: "IT IS ORDERED that, effective January 1, 1971, the Local Rules of the United States District Court for the District of Minnesota, which became effective January 1, 1970, shall be amended by the addition of a new rule, 6E, reading as follows:

Rule 6E. In all civil jury cases, jurisdiction for which is based on 28 U.S.C. Sec. 1332, 45 U.S.C. Sec. 51, and 46 U.S.C. Sec. 688, The jury shall consist of six members.

Dated: November 12, 1970.

/s/ EDWARD J. DEVITT
Chief Judge
/s/ EARL R. LARSON
District Judge
/s/ MILES W. LORD
District Judge
/s/ PHILIP NEVILLE
District Judge

thought that if the Rule in its limited form was effective and withstood challenge, if any, it later would be extended to federal jurisdiction cases as well.

The new Rule and the reasons for it were fully explained to the members of the Bar thru articles in legal periodicals and by appearances before Bar Association meetings.

The Bar has fully cooperated in inaugurating the new Rule and trial attorneys have expressed satisfaction with it in practice.

It is suggested that the present three peremptory strikes per side now permitted by the statute, 28 U.S.C. 1870, be reduced to two per side in order to provide a better proportioned relationship between the size of the jury and the permitted number of strikes. The present statute providing for a total of six peremptory strikes was enacted in the light of the then constitutional requirement

of a jury of twelve. The Jury Committee of the Judicial Conference of the United States has this suggested change under consideration and it seems reasonable to expect that such an amendment will be recommended.

The Judges of the Court have been completely satisfied with the new Rule. The practice under it permits an appreciable saving of time for the Court and its supporting personnel in calling, impaneling, interrogating and otherwise managing the jury panel. Obviously it takes less time to poll six jurors than twelve. Six move in and out of the jury box in a shorter time. The same time saving is true in the jurors' examination of exhibits during trial. It is also likely, but difficult to substantiate, that six can come to a unanimous decision more quickly than twelve.

Our experience has given us every reason to believe that the verdicts of smaller juries are just as reasoned and sound, and are based on the same care and consideration of the evidence and faithful subscription to the Court's charge as are the verdicts of the traditional twelve-man jury.[3]

Indeed the United States Supreme Court has expressed confidence in the reliability of verdicts reached by juries of less than twelve. Justice White observed in Williams:

> "... Certainly the reliability of the jury as a fact-finder hardly seems likely to be a function of its size."

and concluded that there is little reason to think that the proper goals of the jury

> "... are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12 -- particularly if the requirement of unanimity is retained." Williams, p. 1906.

A not insignificant virtue of the change to the six-man jury is the substantial financial saving it effects.

In the five month period since the Rule became effective, the Judges of the Court have tried every case covered by the Rule to

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3. Such experiments as have been conducted support this conclusion. See Wiehl, The Six Man Jury, 4 Gonzaga L.Rev. 35, 38-39 (1968) at 40-41; Tamm, The Five-Man Civil Jury; A Proposed Constitutional Amendment, 51 Geo.L.J. 120, 128-130 (1962), at 134-136; Cronin, Six-Member Juries in District Courts, 2 Boston B.J. 27 (1958); Six-Member Juries Tried in Massachusetts District Court, 42 J.Am.Jud. Soc. 138 (1958); New Jersey Experiments with Six-Man Jury, 9 Bull. of the Section of Jud. Ad. of the ABA (May 1966); Phillips, A Jury of Six in all Cases, 30 Conn. B.J. 354 (1956).

six-man juries without incident or objection. The twenty-seven civil cases so tried took eighty-nine trial days totalling 524 juror days.[4] The immediately discernible financial savings is substantial. Jurors receive statutory compensation of $20.00 per day and an estimated average of $5.00 per day in mileage and expense reimbursement for a total of $25.00 per day. This figure multiplied by the 524 juror days which were saved by the six-man jury Rule represents a money saving of $13,100.

If the Rule is broadened to cover all civil cases, as we expect to do in the near future, additional savings will be made.

The saving in jury expenses if the six-man jury rule were effected country-wide is impressive. In fiscal year 1970, 3,371 civil jury trials were conducted in the Federal Court System. These cases took 10,701 trial days and, with twelve-person juries, a total of 128,512 juror days. If this figure is cut in half and multiplied by $25.00 the approximate saving effected by employing a six, rather than a twelve-man jury, would exceed $1,600,900!

The trend toward six-man juries in civil cases in the Federal Courts is growing rapidly. In the past five months, 16 or more

districts have adopted a rule providing for juries of less than twelve.[5]

---

4. During the same period the Judges tried 16 criminal cases and two civil antitrust cases, not covered by the Rule, to 12 man juries.

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5. The Districts, effective date of the Rule, and the type of cases to which it is made applicable are:

District	Effective	Applies
Minnesota	1/1/71	Diversity, FELA, Jones Act
Eastern District of Illinois	2/1/71	Diversity, FELA, Jones Act
District of Columbia–Superior Court	2/1/71	Unless counsel request 12
Southern District of Florida	3/1/71	Diversity, FELA, Jones Act
Central District of California	3/1/71	All

(Continued)

The Judges in at least 19 other districts are in the process of, or are considering making the change.[6] These figures probably underestimate the present number of districts which have adopted the six-man jury since my information is limited to that acquired thru unofficial correspondence with Judges and Clerks.

The movement in the federal courts has encouraged state legislatures to provide for juries of less than twelve in state court civil trials. New Mexico is considering the change and the Minnesota Legislature recently enacted such a law.[7]

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5. (continued)

Western District of Louisiana	4/15/71	Diversity, FELA, Jones Act
Southern District of Illinois	5/1/71	All
Eastern District of Louisiana	5/1/71	All
Northern District of Indiana	5/1/71	Diversity, FELA, Jones Act, Land Condemnation
Southern District of Indiana	5/1/71	Diversity, FELA, Jones Act, Land Condemnation
New Mexico	5/1/71	All

Wyoming	5/1/71	Diversity, FELA, Jones Act
Kansas	6/1/71	All
District of Columbia–District Court	6/1/71	All
Western District of Texas	7/1/71	Diversity, FELA, Jones Act
Northern District of Illinois	9/13/71	All

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6. The districts are:

Eastern District of Arkansas	North Dakota
Northern District of Florida	Northern District of Oklahoma
Hawaii	Oregon
Maine	Eastern District of Pennsylvania
Maryland	Western District of Pennsylvania
Eastern District of Michigan	Rhode Island
Western District of Missouri	South Dakota
New Hampshire	Middle District of Tennessee
Eastern District of New York	Northern District of Washington
Northern District of New York	

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7. House File 2094 enacted by 1971 Minnesota State Legislature, amending Minnesota Statutes 1969, sections 593.01, 546.09 and 546.10.

Three states, Florida, Utah and Virginia, have provisions making a less than twelve-man jury mandatory in civil jury trials in their courts of general jurisdiction. Fla. Stat. Ann. Sec. 54.14 (1943) (Six jurors); Utah Const. Art 1, Sec. 10 (eight jurors); Va. Code Ann. Sec. 8-193 (1950) (seven jurors).

-7-

The Judicial Conference of the United States at its March 1971 meeting endorsed "in principle" the use of six-man juries in civil cases and its committees are studying the best method for effecting the practice systemwide, either thru amendment of the Civil Rules of Procedure, the enactment of specific statutory authority, or both.

The constantly increasing work burden of the Federal Courts requires a reappraisal of our practices and the adoption of new methods and procedures to meet the added responsibility. In the District of Minnesota the number of civil case filings increased 22% and the number of criminal case filing increased 46% between

fiscal years 1969 and 1970. Rowland F. Kirks, Director of the Administrative Office of the United States Courts states in his 1970 Annual Report that nationwide the civil and criminal filings have increased 13% over 1969, and that the backlog in the United States District Courts is now the highest in history.

We have the duty, all of us, to search for new and better methods of judicial administration. Employment of six-man juries in civil cases is one way of increasing the efficiency of the Courts and at considerable financial saving to the Government and without sacrifice of essential legal rights of the litigants.

The experiment in Minnesota has been successful.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

(Title omitted in printing)

ANSWER OF RESPONDENT

STATE FARM MUTUAL AUTOMOBILE

INSURANCE COMPANY

I.

This respondent accepts petitioner's statement of facts.

II.

ISSUES

There are three issues presented:

A. Can a United States District Court adopt a rule of procedure which denies to civil litigants the right to a jury trial before a jury of twelve, or any number between six and twelve, jurors?

B. Should a United States District Court be permitted to adopt a rule of procedure which, when applied, substantially changes the nature of civil juries?

C. Should a United States District Court be permitted to

adopt a rule of procedure, the validity of which is in substantial doubt, thus imposing on litigants the risk and uncertainty of appellate reversal on a point over which the litigants have no control?

III.

REASONS THAT THE WRIT SHOULD ISSUE

1. Rule 13(d)(1), Revised Rules of Procedure of the United States District Court for the District of Montana, (hereinafter simply Rule 13(d)(1) is in derogation of the Seventh Amendment to the Constitution of the United States.

2. Rule 13(d)(1) violates 28 USC Sections 2071 and 2072 and Rule 83, F.R.Civ.P.

3. Rule 13(d)(1) violates and is inconsistent with 28 USC Section 2072.

4. "Reform" of the jury system by reducing the size of juries, even if permissible and desirable, should be accomplished legislatively and comprehensively; specifically, a six-man jury chosen after the exercise of six peremptory challenges is virtually certain not to be a fair cross-section of the community.

5. Even if this Court should approve Rule 13(d)(1), the issue would be subject to doubt and uncertainty until the Supreme Court of the United States decides it.

Respondent STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY therefore urges that the Court grant the petition for a writ of mandamus and direct the respondent to try Civil No. 783 to a jury of twelve persons.

Respectfully submitted,

JARDINE, STEPHENSON, BLEWETT & WEAVER

By /s/ L. Morris Ormseth

Attorneys for Respondent STATE FARM MUTUAL AUTOMOBILE INSURANCE

COMPANY
700 First National Bank Building
Great Falls, Montana

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROLAND V. COLGROVE,

Petitioner,

-vs- **No. 71-2546**

HON. JAMES F. BATTIN, United States District Judge for the District of Montana, Billings Division,

Respondent.

Original Proceedings
Petition for Writ of Mandamus

Before: MERRILL, DUNIWAY and TRASK, Circuit Judges

MERRILL, Circuit Judge

Pursuant to the authority of Rule 83 of the Federal Rules of Civil Procedure,[1] the District Court for the District of Montana promulgated its local Rule of Procedure 13(d)(1), effective September 1, 1971:

> "A jury for the trial of civil cases shall consist of six persons * * *."

In Civil Case No. 783 in the District Court for the District of Montana, petitioner, as plaintiff, sought a jury trial. Respondent District Judge, over the objection of petitioner that he was entitled to a jury of twelve, ordered that trial be to a jury of six persons, pursuant to the new local rule. Petitioner, by these proceedings seeking a writ of mandamus, challenges the validity of that rule. The defendant in Civil Case No. 783 has appeared in these proceedings, aligning itself with the position of petitioner.

The challenge to the District Court rule is primarily on three levels:

1. It is contended that the rule violates the Seventh Amendment to the Constitution of the United States.[2]

We conclude otherwise.

In Williams v. Florida, 399 U.S. 78 (1970), the Supreme Court held that the Sixth Amendment does not guarantee a right to a jury of twelve in criminal cases. While the question of whether this conclusion should apply to civil cases under the Seventh Amendment was reserved by the Court, 399 U.S. at 92 n. 30, the reasons given for the holding seem to us to apply with equal force to the Seventh Amendment. That amendment does, it is true, refer to the common law. It does not, however, purport to define the jury or trial by jury in terms of the common law.

2. It is contended that the local rule cannot stand in light of 28 U.S.C. Sec. 2072, the statute which authorized promulgation by the Supreme Court of the Federal Rules of Civil Procedure.[3]

We conclude otherwise.

Here we are confronted with the phrase "right of trial by jury as at common law." This language upon its face would appear to deny to the Supreme Court authority to dispense with any characteristics of the jury or of trial by jury known to the common law. This would indeed be a sweeping limitation. The Congress has, it is true, dealt extensively with the jury system. 28 U.S.C. Sec. 1861 et seq. It is hardly conceivable, however, that it was felt that the Supreme Court should not be allowed initially to move in interstitial areas save in accordance with perhaps archaic common law procedures.[4]

An historical inquiry suggests that the language in question was included in the predecessor statute, Act of June 19, 1934,

ch. 651, Sec. 2, 48 Stat. 1064, in anticipation that the forthcoming rules would unite law and equity and to assure that with such union the right of trial by jury would be neither expanded nor contracted. 5 Moore's Federal Practice, par. 38.06 at 44 (2d ed. 1971). See also House Rep. No. 1829, 73d Cong., 2d Sess. (1934).

We construe the language in question in accordance with this position. In our view, "as at common law" in this context means "in those cases in which the right existed at common law." The parallel inclusion in Sec. 2072 of the phrase "as declared by the Seventh Amendment" serves to assure that the essence of the right to trial by jury itself will be maintained in appropriate cases governed by the federal rules.[5] Each phrase then serves an important but distinct purpose.

3. It is contended that the rule is inconsistent with Rules 38(a)[6] and 48[7], Federal Rules of Civil Procedure, and thus violates Rule 83, supra, as quoted in note 1.

We conclude otherwise.

As to Rule 38(a), our discussion of the Seventh Amendment applies.

Rule 48 must, we feel, be read in light of the fact that at the time of promulgation a jury of twelve was the only jury known to the federal law and was thought to be constitutionally required.[8] The rule as promulgated thus provided means for obtaining a less cumbersome fact-finding body than was otherwise provided by law by allowing the parties in a civil trial together to waive their individual rights to a jury of a certain size.[9] To read it to provide means for enlarging the jury, i.e., as an affirmative grant of a right to the parties to demand more than the law otherwise requires, is to stand it on its head.

Judge Devitt, Chief Judge of the United States District Court for the District of Minnesota, writing on the subject of the six-man

jury in federal courts, states with reference to Rule 48:

> "This rule was adopted before the Williams decision and was drafted in the light of the then long established constitutional interpretation, see Thompson v. Utah, [170 U.S. 343 (1898)], that a jury must consist of 12 members. But an inference that Rule 48 now requires a jury of 12 absent a stipulation is, in my view, not a proper post-Williams interpretation of the Rule." Devitt, The Six Man Jury in the Federal Court, 53 F.R.D. 273, 274 n. 1 (1971).

Such apparently is also the view of the many district courts which have now adopted rules similar to that of the Montana District Court.[10]

Writ denied.

FOOTNOTES

1. (Page 1) Rule 83 provides in part that:

   "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules."

2. (Page 2) U.S. Const., amend. VII:

   "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

3. (Page 2) This section provides in part:

   "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

4. (Page 2) Cf. Byrne v. Matczak, 254 F.2d 525, 528-29 (9th

Cir.), cert. denied, 358 U.S. 816 (1958), where the court determined (though in response to a constitutional attack) that a district judge had discretion to order dispersal of the jury overnight despite the fact that "the allowance of a dispersal is contrary to the old common law." The court ruled that "fair new procedures, which tend to facilitate proper fact finding, are allowable, although not traditional." 254 F.2d at 529.

5. (Page 3) Cf. Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 10 (1941). (If under the predecessor of Sec. 2072 "the rules are to prescribe a single form of action for cases at law and suits in equity, the constitutional right to jury trial inherent in the former must be preserved.") (emphasis supplied).

6. (Page 3) Rule 38(a):

> "The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

7. (Page 3) Rule 48:

> "The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

8. (Page 3) See the discussion in Williams v. Florida, 399 U.S. 78, 90-92 (1970).

We note that Fox v. United States, 417 F.2d 84, 89 (5th Cir. 1969), cited Rule 48 for the proposition that the verdict in federal civil trials must in the absence of stipulation be given by twelve jurors. This decision, however, was rendered prior to Williams v. Florida, discussed in text, and thus quite understandably saw Rule 48 as reflecting the

then-established view that a party who did not choose to stipulate to a lesser number was entitled to trial by a jury of twelve.

9. (Page 3) Cf. 5A Moore's Federal Practice 2152 (2d ed. 1971).

10. (Page 4) See, e.g., Devitt, The Six Man Jury in the Federal Courts, 53 F.R.D. 273, 277 n. 5 (1971).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

IT IS HEREBY ORDERED that the Revised Rules of Procedure of the United States District Court for the District of Montana effective January 1, 1968, be amended in the following respects, effective September 1, 1971:

* * *

Rule 13(d)

(d) Jury Trials.

1. A jury for the trial of civil cases shall consist of six persons plus such alternate jurors as may be impaneled.

* * *

CERTIFICATE OF SERVICE

I, LLOYD J. SKEDD, attorney for the Petitioner herein, hereby certify that on this 21st day of November, 1972, I served the foregoing Single Appendix by depositing full, true and correct copies thereof, in the United States mail, first class postage prepaid, addressed as follows: (Airmail, 3 copies each)

Honorable James F. Battin
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